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NO. 94-7418

IN THE

Supreme Court, U.S.
FILED
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UNITED STATES SUPREME COURT

OCTOBER TERM, 1995

ADELE FULLER, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF RALPH E. FULLER, JR.

Petitioner

v.

THOMAS CUMMINGS, MICHAEL KING, CARL LA BIANCA, THE CITY OF NORWALK AND NORWALK POLICE DEPARTMENT

Respondents

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The following should be added to the Petitioner's Statement of the Case and/or be emphasized therein.

Petitioner's attorney agreed, at the time of trial, that the Respondent police officers could not possibly have known that the Petitioner's decedent's rifle had been unloaded at the time of the incident. Police Officer King fired his weapon (.38 handgun) prior to the weapon discharge of Police Officer Cummings. Petitioner's attorney, at the time of trial, further stipulated that King's weapon would also have created a muzzle flash (in addition to the weapon held by Fuller).

Police Officer Cummings testified that he saw a flash off to his left. He further testified that he believed that Fuller had shot Officer King.

However, Police Officer Cummings also testified that he did not know exactly where the shot came from. Further, he testified he had already decided to fire his weapon prior to seeing the flash.

SUMMARY OF ARGUMENT

The reasonableness of the police officers' actions must be judged only by the facts known to them on the scene and at the moment of the incident.

ARGUMENT

The Supreme Court held in *Graham v. Connor*, 490 U.S. 386 at 395, 109 S. Ct. 1865 at 1871, 104 L.Ed.2d 443, that an "objective reasonableness" standard would be employed to judge the constitutionality of police officers' activities in excessive force claims. Further, the Court held in *Graham v. Connor*, *supra*, as follows:

> "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight (citation omitted) ... With respect to a claim of excessive force, the same standard of reasonableness at the moment applies ... The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation", *Id.*, 490 U.S. at 396-397, 109 S. Ct. at 1872.

Further, this "objective reasonableness" standard must be judged "in light of the facts and circumstances confronting them".

In the present case the Respondent Cummings never testified that he actually saw Fuller fire his rifle. He only testified that he saw a muzzle flash that came from the direction of both King and Fuller. In fact, Fuller's counsel stipulated that King's .38 revolver would also cause a muzzle

flash. Cummings also testified that he was not sure where the flash came from. He further testified that, in any case, he had already made his determination that it was necessary to fire his weapon.

In addition, any probative value that the weapon was unloaded, is outweighed by the prejudicial effect such evidence might have on the jury, Fed. R. Evid. 403; see *Scott v. Henrich*, 978 F.2d 41 (9th Cir.).

CONCLUSION

The Respondents agree with the Second Circuit Court of Appeals' holding that "the District Court correctly determined that this after-acquired evidence was not directly relevant under the *Graham* standard of objective reasonableness".

Further, the Respondents agree with the Second Circuit Court of Appeals' determination of the District Court's discretion in ruling "that the after-acquired evidence was not relevant to Cummings' testimony" should not be disturbed.

THE RESPONDENTS

By _____

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, on the 9th day of August, 1995, to the following:

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